RECORD AND BRIEFS

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In the

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization. NRDC and its members have a significant interest in remedying the health and environmental harms caused by hazardous waste contamination.

SUMMARY OF ARGUMENT

Congress enacted CERCLA Section 9658 in order to prevent plaintiffs harmed by hazardous waste contamination from being unfairly denied recovery as a result of state time limitations. Because these plaintiffs often do not discover the fact or scope of their injuries until many years after the contamination has occurred, their claims were vulnerable to state laws that bar recovery in much shorter periods of time. Congress's solution was to impose a uniform "discovery rule" for tort claims based on toxic contamination, which would allow plaintiffs to bring suit at the time that they knew or reasonably should have known that their injuries were the result of that contamination – thereby permitting plaintiffs who act diligently to seek recovery for latent harms

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[1] Pursuant to S. Ct. R. 37.6, counsel for *amicus* state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this *amicus curiae* brief by a blanket agreement filed with the Clerk of this Court. Respondents have consented to the filing of this *amicus curiae* brief by a consent letter that is being lodged with the Clerk of the Court.

that might otherwise be barred by earlier state limitations periods.

Section 9658 applies to both personal injury and property damages caused by hazardous waste contamination. Either form of harm may be concealed or dormant for long after a defendant causes contamination to occur; both the presence of toxic substances in soil or groundwater and the health effects that result from exposure to these substances are difficult to detect and may not manifest as injury for decades. However, Petitioner argues that Section 9658 does not apply to "statutes of repose," state time limitations on bringing suit that typically last 10 years from the last act or omission of a defendant. If the Court were to adopt Petitioner's position, injured plaintiffs who act promptly after discovering their injuries would not be able to pursue any claim for redress.

This was not the result that Congress intended. It is apparent from the text of Section 9658 and the accompanying legislative history that the statute ensures plaintiffs' ability to seek recovery for latent harms caused by toxic contamination after statutory periods of repose expire, if those periods are inconsistent with the discovery rule in the federal law. Section 9658 applies to all state limitations periods, however formulated.

ARGUMENT

I. Introduction

Congress enacted CERCLA Section 9658 to remedy a specific, identified problem: state limitations pe-

riods were preventing tort plaintiffs from seeking redress for latent contamination and associated personal injury and property damage. Specifically, state time limitations that expired before plaintiffs could discover their injuries had the effect of depriving plaintiffs of their cause of action before they knew it existed. Because harm from chemical contamination of property typically is not – and often cannot be – discovered until many years after the contamination occurs, Congress enacted Section 9658 to ensure that plaintiffs could seek a remedy for latent contamination injuries. Petitioner asks this Court to thwart this purpose by interpreting Section 9658 to allow state statutory "repose" periods to bar relief in such cases. Periods of repose set time limitations based on the date of the defendant's last act or omission, rather than the date that the plaintiff discovers an injury, and as a result may extinguish a plaintiff's cause of action before the plaintiff's injury becomes apparent.

According to Petitioner, Section 9658 applies "unambiguously" only to "statutes of limitation," which Petitioner distinguishes from statutory periods of repose. *See* Pet. Br. 20. Under Petitioner's theory, Congress's purpose for enacting Section 9658 is largely irrelevant to the question of how the statute should be read. Petitioner therefore endorses a reading that fails to address the singular problem that motivated Congress to enact Section 9658: state statutes that prevent plaintiffs from recovering for latent injuries.

The types of harm associated with toxic contamination – latent illnesses and concealed property damage – are commonly discovered decades after

contamination enters the environment. In contrast, periods of repose may bar claims brought 10 or fewer years following the defendant's last act or omission. Congress was aware of both of these facts when it enacted Section 9658. Thus, under Petitioner's preferred reading of Section 9658, Congress's solution for contamination plaintiffs whose claims were time-barred by state statutes was – "unambiguously" and by design – nothing more than a paper tiger, useless against state limitations that began on the date of the defendant's last act or omission. There is no evidence for this in either the statutory text or the legislative history. Rather, Congress intended Section 9658 to be effective against all contrary state limitations periods, however those limitations are styled. Congressional intent should not be so readily disregarded in interpreting the meaning of a statute. The latent harms associated with toxic contamination, precisely those injuries that Congress intended to address with Section 9658, confirm that Section 9658 must apply to all state limitations periods, including periods of repose.

II. Harm resulting from toxic contamination is often not discovered until many years after a defendant's last act or omission

A. Toxic contamination is a serious and continuing problem

When Congress enacted CERCLA in 1980, toxic contamination represented a new and serious threat, well-hidden and long-lasting. The Love Canal tragedy – in which chemicals buried at a dump site 25 years earlier leached up into a residential communi-

ty later built on the site – revealed that threats seemingly laid to rest could have unexpected consequences far into the future. A rash of congenital birth defects among children born to the Love Canal community hinted at another grim aspect of toxic contamination, that exposure to toxic substances could produce injuries not felt or realized until much later. The threat of other buried toxic sites loomed large; they were seen as "time bombs," numbering in the unknown hundreds across the nation. *See* Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 18 (1979).[2]

Today, the threat of toxic contamination in soil and groundwater remains a key environmental concern. In 2013, EPA added 18 new sites to the CERCLA National Priorities List (NPL). *See* 78 Fed. Reg. 31,417, 31,421 (May 24, 2013) (to be codified at 40 C.F.R. pt. 300); 78 Fed. Reg. 75,475, 75,478 (Dec. 12, 2013) (to be codified at 40 C.F.R. pt. 300). As of February 27, 2014, there are 1,319 sites on the NPL, compared to only 375 sites that have so far been remediated and removed from the list.[3] EPA, *National Priorities List (NPL)*, http://www.epa.gov/superfund/sites/npl. However, the NPL represents only the worst-contaminated sites. *See* EPA, *Frequent Questions about Superfund Redevelopment*, http://www.epa.gov/oerrpage/superfund/programs/recycle/faqs/index.html. The problem of toxic contamination is

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[2] *Available at* http://www2.epa.gov/aboutepa/love-canal-tragedy.

[3] A site is removed from the NPL if EPA determines that all appropriate response actions for the site have been implemented, or that the site poses no significant threat to public health or the environment. 40 C.F.R. § 300.425(e).

much, much larger. In 2004, EPA estimated that 217,000 new contamination sites requiring cleanup would be discovered in the following 30 years, based on historical trends. EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends* 1-4 (2004)[4] [hereinafter *Cleaning Up the Nation's Waste Sites*]. While this figure includes new additions to the NPL, the vast majority will have to be remediated by other state or private programs. *Id.* There is presently no single information source that tracks the extent of contaminated land nationwide. EPA, *EPA's 2008 Report on the Environment* 4-49 (2008)[5] [hereinafter *Report on the Environment*].

Sites of toxic contamination are disproportionately located near low-income and minority populations. Krista Yacovone, *Brownfields and the Poor: Is Cleanup a Hazardous Waste of Time? An Analysis of the United States' Efforts at Remediation and Their Applicability to Brazil*, 35 FORDHAM INT'L L.J. 201, 215 (2011). Contamination can disproportionately impact vulnerable populations, including minorities, women, and children. *Id.* at 220. Environmental toxins may contribute to certain health conditions that are more prevalent among members of these populations. *Id.* at 220-21. For example, contaminants may aggravate osteoporosis, which is more common among women, as well as diabetes, chronic liver disease, cardiovascular disease, and chronic respiratory

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[4] *Available at* http://www.clu-in.org/download/market/2004market.pdf.

[5] *Available at* http://www.epa.gov/roe/docs/roe_final/EPAROE_FINAL_2008.PDF.

disease, to which certain minority populations are predisposed. *Id.* at 221.

Many toxic substances contribute to contamination. EPA and the Agency for Toxic Substances & Disease Registry (ATSDR)[6] maintain a Substance Priority List (SPL) of substances commonly found at CERCLA remediation sites, ranked by frequency of occurrence, toxicity, and potential for human exposure. *See* ATSDR, *Priority List of Hazardous Substances*, http://www.atsdr.cdc.gov/SPL [hereinafter *SPL*]. Currently, there are 275 substances on this list. *Id.* Among the highest-ranked substances are heavy metals, including arsenic, lead, mercury, and cadmium; volatile organic compounds (VOCs), including vinyl chloride, benzene, chloroform, and trichloroethylene (TCE); and persistent organic pollutants (POPs), including polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and the pesticide DDT. *Id.*

These substances may enter the ground from a variety of sources, including industrial and waste management facilities, mining operations, military bases, underground storage tanks, and agricultural land. *Report on the Environment*, *supra* at 4-43 box 4-1. Toxic substances may be deposited through accidental spills and leaks, or through illegal dumping. *Id.* Once in the ground, contamination can reach humans in many ways. Direct contact with contaminated soil, drinking contaminated surface or ground water, and breathing contaminated vapors or dust

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[6] ATSDR is an agency of the Department of Health and Human Services.

all expose people to toxic substances. *Id.* at 4-43. Toxic contamination in soil and groundwater can volatilize and enter homes and other buildings, in the process known as "vapor intrusion." *Id.*; *id.* at 3-26. Eating exposed plants or animals also exposes people to toxic contamination; some toxins that accumulate in fatty tissues in fact become more concentrated as they move up the food chain. *Id.* at 5-15.

Toxic contamination harms both humans and the environment. Exposure to toxic contamination is linked to a number of serious health effects, including various forms of cancer. U.S. Dep't of Health & Human Servs., *Report on Carcinogens, Twelfth Edition* (2011)[7] [hereinafter, *Report on Carcinogens*]. Even if a landowner suffers no health problems, she will likely suffer property damage as a result of the presence of contamination on her land. Either of these harms may not become apparent for many years after contamination, either because they are difficult to observe or discover or because they do not immediately manifest themselves as injury. *See* Susan M. Cooke, The Law of Hazardous Waste § 17.05[4] (Matthew Bender, 2014) (Lexis Advance) ("In addition, due to the long latency period of diseases associated with chemical exposure, as well as the covert nature of the property damage that typically results from contamination, often many years pass before the plaintiff discovers the injury and commences suit.").

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[7] *Available at* http://ntp.niehs.nih.gov/ntp/roc/twelfth/roc12.pdf.

B. Toxic contamination may not be discovered until years or decades after it enters the ground

That contamination in the ground is not always readily apparent is unsurprising – it is, in effect, "out of sight, out of mind." However, this simple explanation does not fully capture the problems associated with discovering toxic contamination in soil or groundwater. Contamination may date back to activities that occurred many years ago, of which there may be no other record than the contamination itself. Once toxic substances enter the ground, they can migrate slowly and in ways that are very difficult to trace. Contamination can be practically invisible even when it is close at hand, as when it appears at the surface of the ground or in drinking water. And contamination does not go away easily – substances can remain toxic for decades into the future, past the time in which state tort remedies traditionally expire.

Many of the toxic sites that are expected to be discovered or remediated in the future were contaminated decades in the past. For example, EPA estimates that between 9,000 and 90,000 inactive dry cleaning sites nationwide remain undiscovered, many of which closed in the 1980s or earlier.[8] *Cleaning Up the Nation's Waste Sites*, *supra* at 12-10. Tens of thousands of manufactured gas plants and related facilities that were decommissioned decades ago

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[8] The dry cleaning industry uses a variety of hazardous chemicals and solvents, including tetrachloroethylene (PCE) and TCE. *Cleaning Up the Nation's Waste Sites* at 12-2.

have still not yet been investigated for contamination.[9] *Id.* at 10-6. Of the more than 38,000 current and former military sites identified by the Department of Defense as contaminated or known or suspected to contain unexploded ordnance or munitions, over 9,000 have not yet been cleaned up, and over 7,000 have no remediation system in place.[10] U.S. Dep't of Def., *Fiscal Year 2012 Defense Environmental Programs Annual Report to Congress* 5 tbl. 3, 7 tbl. 5 (2013).[11] With heightened regulatory requirements for using and disposing of hazardous substances, toxic contamination is increasingly associated with practices that are no longer in use. With the exception of accidental spills and natural events, most land contamination is the result of historic activities. *Report on the Environment*, *supra* at 4-42.

Contamination can be considerably difficult to identify or locate. This is a primary reason that toxic contamination remains a problem so long after the events or activities that caused it have ceased. Unlike most other property hazards, toxic contamination in soil or groundwater is not usually readily apparent to a purchaser or user of land. Often, toxic contaminants have no odor, taste, or color. For example, dangerous levels of arsenic, lead, and vinyl

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[9] These facilities generated coal tar and other oil byproduct contaminants, including PAHs. *Cleaning Up the Nation's Waste Sites*, *supra* at 10-9.

[10] Department of Defense contamination sites may contain many different forms of contamination, including petroleum products, solvents, heavy metals, and PCBs. *See Cleaning Up the Nation's Waste Sites*, *supra* at 6-1.

[11] *Available at* http://www.denix.osd.mil/arc/loader.cfm?csModule=security/getfile&pageid=36957.

chloride cannot be seen or tasted in groundwater.[12] Private well owners may be subject to minimal or no testing requirements, and thus may not realize that their groundwater is contaminated. EPA, *Recommendations from the EPA Ground Water Task Force: A Report by the Ground Water Task Force* B-5 (2007)[13] [hereinafter, *Task Force Recommendations*]. Contaminants can travel underground from adjacent properties, and even visible signs of surface contamination can escape diligent inspection, especially where property is densely vegetated. Arthur E. Rhoades, *Damage to Real Property: The Lay of the Land*, 75-OCT J. KAN. B.A. 6, 6 (2006). As a result of these difficulties, landowners are often unaware of the presence of contamination on their property. EPA, *Superfund Enforcement: Success in Enhancing Fairness and Expediting Settlements*, http://www.epa.gov/superfund/accomp/17yrrept/report3.htm.

Some forms of toxic contamination are especially difficult to discover. For example, certain toxic contaminants known as "dense nonaqueous phase liquids" (DNAPLs)[14] can be particularly difficult to de-

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[12] *See* ATSDR, *Public Health Statement: Arsenic* (2007), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp2-c1-b.pdf; ATSDR, *Public Health Statement: Lead* (2007), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp13-c1-b.pdf; ATSDR, *Public Health Statement: Vinyl Chloride* (2006), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp20-c1-b.pdf. Each of these substances is among the top five on the SPL. *See SPL.*

[13] *Available at* http://www.epa.gov/superfund/health/conmedia/gwdocs/pdfs/gwtf_report_coverletter.pdf.

[14] TCE, PCE, PCBs, PAHs, and coal tar are all common examples of DNAPLs. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2, 14-3 exhibit 14-1.

tect, trace, and remediate. DNAPLs are colorless, so they are rarely directly observed at contamination sites. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2. They are heavier than water, and only slightly soluble in water, which means that they can penetrate soil to well below groundwater levels. *Id.* at 14-1 to 14-2. DNAPLs migrate in thin, winding trails through pores and fractures in the ground, pooling and spreading laterally at less permeable layers, making their distribution difficult to determine. *Id.* at 14-2. DNAPLs move through soil independently of groundwater – and sometimes even in a different direction – meaning that their migration cannot be accurately predicted by groundwater analysis. EPA, *Ground Water Issue: Dense Nonaqueous Phase Liquids* 12 (1991).[15] DNAPLs can cause health and ecological risks at concentrations as low as a few to hundreds of parts per billion. EPA, *Dense Nonaqueous Phase Liquids (DNAPLs): Overview*, http://cluin.org/DNAPL. EPA estimates that DNAPLs are likely to appear at 29 to 45 percent of NPL sites, as well as tens of thousands of other contaminated areas nationwide. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-7 to 14-8.

Other factors prolong the time between ground contamination and discovery. Unlike air or surface water pollution, which spread relatively quickly through the environment, contamination in soil or groundwater may migrate very slowly. Thus, even if a landowner is aware of or suspects contamination on nearby properties, this contamination may not ac-

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[15] *Available at* epa.gov/superfund/remedytech/tsp/download/issue8.pdf.

tually reach the landowner's property until years later. Cooke, *supra* at § 17.04[1]. Contamination that has lain dormant for many years may migrate suddenly, as a result of changes in the surrounding earth. Activities like mining or construction can remove natural barriers to toxic pollutants, allowing them to travel into areas that were not previously contaminated. *Task Force Recommendations*, *supra* at B-5.

Of course, historic contamination would not be a problem if toxic substances broke down into nontoxic components soon after entering the ground. Unfortunately, this is generally not the case. Certain classes of contaminant are especially long-lasting. For example, DNAPLs' low solubility means that they can continue releasing small but environmentally critical amounts of contamination into groundwater for very long periods of time. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2. Similarly, heavy metals do not break down from their elemental form, and therefore persist in the environment. Air Pollution Information System (APIS), *Heavy Metals*, http://www.apis.ac.uk/overview/pollutants/overview_HM.htm. POPs remain toxic for decades or longer. *Report on the Environment*, *supra* at 5-15.

C. The health effects associated with exposure to toxic contamination may not be felt until long after a plaintiff has been exposed

Just as the presence of toxic contamination may remain undetected for long after contaminating substances are deposited into ground, the health effects

of exposure to these substances may not be observed or felt for years after the exposure occurs. Exposure to toxic contamination has been linked to numerous serious human health risks. These include both health effects that are felt immediately, and latent harms which may not be perceived until some time after exposure. With many substances and exposures, it is possible to suffer health problems only years or decades after exposure, with no prior indication of harm in the meantime. As a result, a person harmed by toxic substances might not experience any symptoms until long after state limitations periods that are defined by exposure or the actions of a defendant have expired.

Cancer is the most prominent latent health impact of toxic substances. "Cancer" refers to a group of over 200 different diseases, all of which involve an uncontrolled growth and spread of abnormal cells in the body. ATSDR, *Cancer Fact Sheet*, http://www.atsdr.cdc.gov/COM/cancer-fs.html. Cancer is most common and deadliest in the prostate, breast, lung and bronchus, and colorectum. *Report on Carcinogens*, *supra* at 5. Other forms that have recently increased in incidence include cancers of the kidney, esophagus, liver, thyroid, pancreas, and bladder, as well as cancerous melanoma (in skin), leukemia (in blood or bone marrow), myeloma (in plasma cells and bone marrow), and non-Hodgkin's lymphoma (in blood). *Id.* at 6. Children – who as a population are particularly vulnerable to environmental exposures – most commonly experience leukemia and brain cancer. *Id.*

The Department of Health and Human Services has identified 240 substances and substance classes

that are either known or reasonably anticipated to cause cancer in humans. *See Report on Carcinogens, supra.* This list includes many of the substances featured on the SPL.[16] Some substances and exposure circumstances may cause cancer only by repeated or long-term contact, while others can cause cancer after brief exposure. *Id.* at 3. The first sign of cancer often does not appear until 20 to 30 years or more after exposure to a cancer-causing substance. *Id.* at 4.

Although cancer is the most common latent illness associated with exposure to toxic contamination, other latent health impacts have also been linked to toxic substances. For example, childhood lead poisoning has been associated with effects felt in adulthood, including kidney disease and high blood pressure. ATSDR, *Case Studies in Environmental Medicine (CSEM): Lead Toxicity* 33, 35 (2010).[17] Exposure to lead may also cause health problems that are not immediately apparent, such as cognitive and reproductive impairment. *Id.* at 32. Onset of neurological symptoms of mercury poisoning has been observed up to 10 years from initial exposures. *See* Steve Smith, *Ecological and Health Effects of Chemical Pollution, in* AN INTRODUCTION TO POLLUTION SCIENCE 242 (Roy M. Harrison ed., 2006).

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[16] Almost all of the top-ranked substances on the SPL are either known or reasonably anticipated to cause cancer in humans. Mercury, white phosphorus, and hexachlorobutadiene are the only substances in the top 20 which do not appear on the DHHS list. *See SPL, supra; Report on Carcinogens, supra.*

[17] *Available at* http://www.atsdr.cdc.gov/csem/lead/docs/lead.pdf.

III. Section 9658 establishes a uniform discovery rule for state tort actions arising from hazardous waste contamination that supersedes more restrictive state limitations periods

Section 9658 serves its fundamental purpose by overriding state limitations periods, including periods of repose. The purpose and effect of Section 9658 was to impose a federally-uniform "discovery rule" on state tort actions based on toxic contamination, in recognition of the latent nature of injuries to people and property from such contamination. State limitations periods that are defined either by exposure or by the actions of a defendant (rather than by the date of discovery) present exactly the issue that Congress addressed through Section 9658. Moreover, existing state-law repose periods provide – without exception – for limitations periods that are far shorter than the typical latency period for cancer and other diseases associated with toxic contamination, and far shorter than the time after which a landowner might reasonably first discover migration of contamination onto her property. Congress would not and did not enact Section 9658 to allow tort recovery for latent injuries to people and property only if the latency period was unrealistically short, nor did it intend to preserve periods of repose as a loophole to Section 9658's discovery rule.

A. The text and legislative history of Section 9658 demonstrate that Congress intended to impose a federally-uniform "discovery

rule" on state tort remedies for toxic contamination

When it enacted Section 9658, Congress's purpose was clear: to ensure plaintiffs' access to state court remedies for latent harms from toxic contamination, by imposing a uniform federal "discovery rule" to replace a patchwork of state limitations periods governing these state tort claims. Congress enacted Section 9658 against a backdrop of concern about whether state remedies were adequate to address tort claims that CERCLA itself did not address. Both the text and the legislative history of Section 9658 bear this out. Allowing a defendant to evade preemption simply by availing itself of a law with a different form – but with the same effect of barring a plaintiff's claim before she even would have reason to know of its existence – would prevent Section 9658 from fulfilling its fundamental purpose. Thus, Section 9658 must preempt state limitations periods based on the date of a defendant's last act or omission. The law would not fulfill its basic purpose – indeed, would not make sense in implementation – if courts were to interpret it not to bar repose periods that would cut off tort causes of action based on toxic contamination before the injured individual or property owner was aware of injury or, indeed, had yet been injured at all.

CERCLA's main focus is on allocating responsibility for costs of investigating and remediating toxic sites. CERCLA does not include any provision to either replace or enhance existing state-law tort remedies, beyond the statute's strict liability for costs of investigation and remediation – so, for example,

state tort law still governs plaintiffs' remedies for claims for loss of property value or for personal injury from contamination. But Congress was nonetheless concerned, when it adopted CERCLA, about the adequacy of state-law remedies, and thus Section 301(e) of CERCLA called for a study group composed of lawyers from different organizations to conduct a study "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e).

The study group completed its report, and among the issues addressed in the study was the question of whether and how state-law limitations periods affected plaintiffs' access to tort remedies. The Study Group Report was particularly concerned about the prospect of state limitations periods – including "statutes of repose" – barring plaintiffs' state tort claims before they would be aware of the existence of those claims, because of latency of contamination-related harms. The Report noted:

> A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the traditional or the discovery rule. Since many of the hazardous wastes are carcinogens, mutagens, teratogens or substances with delayed impact on different organs or the central nervous system, the latency period for

> the appearance of injury or disease is likely to be extended for 30 years or more. In states that have not clearly adopted the discovery rule (i.e., that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time barred when the plaintiff discovers his hurt. The Study Group recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one.

Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies pt. 1, at 255-56 (Comm. Print 1982).

While the Study Group Report's recommendation was explicitly aimed at states, Congress evidently concluded that without federal action, the problem that it identified would continue to bar plaintiffs' claims inappropriately. The Study Group Report clearly framed this "problem" as a function of when a limitations period begins to run, rather than the number of years it runs, the language used to ex-

press the limitation, or any other factor. *Id.* at 43; H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354; 42 U.S.C. § 9651(e)(1).

In amending CERCLA in 1986, Congress addressed many contamination-related issues identified or further studied since the passage of CERCLA. With the enactment of Section 9658, Congress specifically intended to "address[] the problem identified in the 301(e) study"; namely, that "certain State statutes deprive plaintiffs of their day in court" by enacting time limitations based on the time of the plaintiff's first injury or exposure, or the time of a defendant's acts or omissions, rather than the time that the plaintiff discovers the injury. *See* H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

This intent is embodied in the plain language of the statute. First, Section 9658 refers to the commencement date established through the federal statute as the "federally required commencement date" – plainly a statement that states are required to use this date, and not some other date, as the commencement date for limitation of actions.[18] 42 U.S.C. § 9658(a)(1). This phrase is used throughout Section 9658 to describe the federal requirement.

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[18] Section 9658 defines "federally required commencement date" as, ordinarily, "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A).

Second, the reference in Section 9658 to "common law" limitations periods, in addition to statutes, makes plain that the specific form in which a state chooses to express a limitations period is not relevant to the scope of preemption under the law. *Id.* It defies logic to speculate that Congress would have intended to preempt all common-law-based limitations periods, but only a specific subset of statutorily-designated limitations periods. There is no sign in either the statute itself or the accompanying legislative history that Congress intended to preserve any form of state limitations period that would prevent plaintiffs from bringing suits before they could discover their injuries. Rather, it is apparent that Congress meant to preempt all state limitations periods that would expire prior to the federally required commencement date.

Finally, Section 9658's "special rule" for minor plaintiffs provides further textual evidence of Congress's intent. Where the injured party is a minor, Section 9658 extends the commencement of any limitations period – the "federally required commencement date" – to the later of the date of discovery or "the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed." 42 U.S.C. § 9658(b)(4)(B)(i). By contrast, a typical 10-year repose period would bar a tort action by a victim exposed to contamination as a young child before the child reaches the age of majority. In this context, reading the statute not to preempt periods of repose would violate Congress's clear mandate to protect children's right to bring an action after they reach majority age, through the application of a uniform federal rule. The only way for

this provision of Section 9658 to have meaning is for the federally-required commencement date to preempt all contrary state limitations periods, however those limitations are styled. If this were not the case, this "special rule for minors" would be wholly inoperative in any state in which a state limitations period was not preempted.

Beyond the plain text of the statute, the legislative history confirms Congress's intent to solve the problem identified in the Study Group Report. The Conference Report on Section 9658 explained clearly how Section 9658 accomplishes this goal:

> While State law is generally applicable regarding actions brought under State law for personal injury, or property damage, which are caused or contributed to by exposure to any hazardous substances, or pollutant or contaminant, released into the environment from a facility, a Federally-required commencement date for the running of State statutes of limitations is established. This date is the date the plaintiff knew, or reasonably should have known, that the personal injury referred to above was caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

See H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

As the language of the conference report made clear, Congress's intent in enacting Section 9658 was

to "address[] the problem identified in the 301(e) study" by implementing the Study Group Report's recommendation to adopt a uniform federal discovery rule, in order to establish consistency in the availability of state-law tort remedies for latent contamination. Thus, by adopting Section 9658, Congress responded directly to the concern of the Study Group that victims of latent environmental harms be able to pursue tort claims. And among the Study Group's conclusions was that "the Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies pt. 1, at 256 (Comm. Print 1982). It could not be more clear that Section 9658 preempts state repose periods for tort claims based on toxic contamination.

B. Under Petitioner's theory, alleged tortfeasors can ensure that victims of latent harms are denied their day in court, especially harming the most vulnerable

Under Petitioner's theory, alleged tortfeasors can ensure that victims of latent harms are denied their day in court, contrary to Congress's clear intent, in at least two ways. First, allowing tortfeasors to use periods of repose to dodge suits by victims of toxic contamination will increase the perverse incentive to conceal contamination. Second, as government funding and resources become less available, even basic

efforts to investigate and remediate toxic sites will be fewer and further between – even aside from direct remedies for tort harms – and affected parties will lose the tools to address contamination's impacts effectively. The result will be that many of those who are most vulnerable to toxic contamination and least able to bear the costs of cleanup will be unable to recover for their harms.

The interpretation of Section 9658 proffered by Petitioner here would increase the perverse incentive to conceal contamination. Potentially responsible parties under CERCLA, and potential toxic tort defendants, already possess incentives to conceal their contamination, including the cost of legal disposal and the desire to avoid liability. Treating repose periods differently would allow defendants to avoid forever the liability for associated torts if they can delay injured parties' discovery of the contamination for the statutory period. Thus, in cases with a probability of tort claims in addition to CERCLA liability, potential defendants will be motivated to bury evidence. This prospect is especially troubling since these may be among the worst toxic contamination cases, and the evidence for the harms necessary to allege and prove a tort will go significantly beyond that necessary to prove a CERCLA cost recovery claim under strict liability principles.

Moreover, while state tort law is generally aimed at a different set of harms than CERCLA – injury to people and property, rather than recovery of costs of investigation and remediation – it is also likely that in the future, government agencies will possess even fewer resources and be capable of paying less atten-

tion to the problem of toxic contamination. Although CERCLA site remediation was initially funded through a trust fund financed primarily through taxes, the authority for the sustaining taxes expired in 1995. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380 SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST 3 (2010).[19] EPA now has limited funding to address future cleanup operations. *Id.* at 33. State budgets for hazardous waste cleanup are also constrained. *Id.* However, future remediation projects are expected to be more expensive and more difficult. *Id.*; *see also* National Research Council, *Alternatives for Managing the Nation's Complex Contaminated Groundwater Sites* 1 (2013) ("While there have been success stories over the past 30 years, the majority of hazardous waste sites that have been closed were relatively simple compared to the remaining caseload."). At the same time, many affected parties – in particular, low-income communities disproportionately located near sites of hazardous waste contamination – will lack the capability to fund investigation and remediation efforts privately. Thus, in addition to its role in ensuring remedies for harms that are not at all reached by CERCLA, tort liability may play a role in future efforts to clean up sites that might once have been remediated through government funding.

Reading Section 9658 not to apply to periods of repose would limit the availability of tort recovery for plaintiffs who have experienced latent personal inju-

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[19] *Available at* http://www.gao.gov/assets/310/304124.pdf.

ry or property damage – exactly the result Congress intended to avoid by enacting Section 9658. Those most likely to be affected by this result include military personnel and their families (who have lived and worked on the thousands of military sites discussed above that have not yet been remediated), young children (who, as discussed above, are most vulnerable to environmental toxicity, and would be unable to avail themselves of the special protections provided under 42 U.S.C. § 9658(b)(4)(B)(i)), and minorities and low-income communities (who, as discussed above, are most likely to live near toxic contamination, and are least able to afford advance cleanup costs recoverable through contribution). This is not the result that Congress intended in enacting Section 9658, and – for the reasons addressed above – does not reflect a proper interpretation of Section 9658.

C. State limitations periods that do not implement a discovery rule, however styled, impose precisely the same insurmountable burdens on plaintiffs bringing tort claims based on toxic contamination with latent harms

As explained above, diseases such as cancer typically do not manifest until well more than a decade after exposure to a chemical agent. Moreover, it is typical for property damage from chemical contamination to lie undiscovered under the ground for many years, even where a property owner is acting with reasonable diligence. In light of the typical, reasonable, and well-known latency of both personal injury

and property harm from contamination, state limitations periods based on the time of the plaintiff's injury or exposure, or the time of a defendant's acts or omissions – whether styled as "statutes of limitations," "statutes of repose," or some other phrase entirely – all impose the same burdens, in practice, on plaintiffs who allege harm from toxic contamination.

Periods of repose typically last between 2 to 12 years after the end of the conduct which raises liability. *Developments in the Law*, *supra* at 1609 n.42. Of the four state statutes identified by respondents as establishing repose periods that are generally applicable to personal injury and property damage cases, Resp. Br. 41 – and thus at issue here – three of the statutes set limitations of 10 years,[20] and one sets a limitation of only 3 years.[21] These periods are considerably shorter than the latency period of diseases caused by exposure to toxic contamination. *Developments in the Law*, *supra* at 1609 n.42. It is also shorter than the typical period of time for contamination to reach a plaintiff's land, or for a plaintiff to discover contamination on her land. For these reasons, reading Section 9658 to apply only to "statutes of limitation" as Petitioner defines the term means that many who suffer latent injuries as a result of hazardous waste contamination will be barred from bringing suit before they could be aware of any harm. This interpretation thus directly contravenes the purpose for which Congress enacted Section 9658.

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[20] *See* Or. Rev. Stat. Ann. § 12.115(1); Kan. Stat. Ann. § 60-513(b); N.C. Gen. Stat. § 1-52(16).

[21] *See* Conn. Gen. Stat. Ann. § 52-584.

For a victim of toxic contamination whose injury becomes apparent only after the time limit set by a period of repose has expired, it will be irrelevant that Section 9658 preempts any shorter limitations period set by common law or statute if it does not also preempt the repose period. For this reason, commentators have recognized that a construction of Section 9658 that would not preempt periods of repose would flout Congress's clear will. "Broadly construed, section 309[22] must apply to statutes of repose as well as statutes of limitations. It simply defeats congressional intent to hold otherwise; statutes of repose were specifically identified as part of the problem by the Study Group and adopted by Congress." Van R. Delhotal, *Re-Examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 WASHBURN L.J. 415, 457 (1995). Courts have similarly recognized this feature of the law. "The problem of plaintiffs losing their cause of action before they know they have it could not have been addressed unless statutes of repose were addressed." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008) (holding that Section 9658 preempted Oregon's statute of repose).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[22] 42 U.S.C. § 9658 (Section 9658) appears in CERCLA as Section 309.

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